No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as Juneau-Douglas Independent School District,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

REPLY BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Texts

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REPLY BRIEF FOR APPELLANTS.

I.

AN OBJECTION TO THE FORM OF REMEDY USED WILL NOT BE HEARD FOR THE FIRST TIME ON APPEAL.

Appellees contend that appellants have made use of the wrong remedy in this action. This objection is made for the first time on appeal. Where a party fails to object to the form of action used at the trial level,

he will not be heard to object for the first time on appeal.

Marine Bank v. Fulton Bank, 69 U.S. 252 (1864);

A. A. Excavating Co. v. First United Finance Co., 52 N.E. 2d (Ill. App.) 837 (1944);

First National Bank of Klemme v. Beier, 26 N.W. 2d (Iowa) 853 (1947);

Marshall v. Heselschwerdt, 6 N.W. 2d (Mich.) 871 (1943);

Taylor v. Independent School District, 164 N.W. (Iowa) 878 (1917);

City of Miami Beach v. Perell, 52 So. 2d (Fla.) 906.

But, appellees' argument goes even further. The contention is that appellants should have proceeded under a statutory action which may be maintained under the direction of the Governor of Alaska, since the writ of *quo warranto* has been abolished in the Territory and this statutory proceeding has been established in lieu thereof.

If this argument is correct, then Section 56-4-1, ACLA 1949, which abolishes the writ of *quo warranto,* is contrary to the provisions of the Organic Act of Alaska as a usurpation by the legislature of the power of the District Court to issue writs of *quo warranto.*

Section 4-2-6, ACLA 1949, provides:

"The legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exer-

> cised by like judges or officers of district courts of the United States."

This section is part of the Organic Act of Alaska.

28 USCA 1651(a) provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Thus, the District Court has power to issue a writ of *quo warranto* by Act of Congress.

The use of writs of *quo warranto* in District Courts is recognized by the Federal Rules of Civil Procedure in Rule 81(a)(2).

Therefore, the use of a writ of *quo warranto* would be open to appellants.

> *Cp. Ex parte Beattie,* 124 So. (Fla.) 273 (1929);
>
> *State v. Wymore,* 119 S.W. 2d (Mo.) 941 (1938).

This being so, then the rule that an objection to the form of remedy used will not be heard for the first time on appeal applies to this case.

But, even should this Court be reluctant to strike down an act of the Territorial Legislature, appellants could still bring an action without the direction of the Governor under Section 56-4-4, ACLA 1949, which provides:

> "An action may be maintained in the name of the United States upon the information of the United States attorney or upon the relation of a private party against the person offending in the following cases: * * * Third. When any association or number of persons act within the Territory as a corporation without being duly incorporated."

This statute would give the same result as would the writ of *quo warranto.*

The cases of *Rister v. Plowman* and *Village of Metamora v. Village of Eureka* (Page 5, Brief of Appellees) cited by appellees are not in point. They were cited on the supposition that Section 56-4-2, ACLA 1949, applies to this case and that, therefore, the Governor must give his direction to bring the action and he must be joined. As has been pointed out, if this result is compelled by Section 56-4-1, ACLA 1949, et seq., then these statutes are contrary to the provisions of the Organic Act and are void, at least in this application. However, as pointed out, appellants urge that Section 56-4-4, ACLA 1949, applies to this case and the Governor's direction would not, in any event, be required to bring the action. Thus, the Governor need not be joined.

The remainder of the cases cited under appellees' first point (see Brief, pp. 6 and 7) are not pertinent because appellees are not now in a position to question the form of remedy used by appellants.

Thus, all the issues are now before this Court as they would have been had the writ of *quo warranto*

been used by appellants. This Court is in the same position to decide the case now as it would have been had another remedy been used. The rule that the form of remedy cannot be questioned for the first time on appeal does apply and this Court is now in a position to decide the case at bar.

II.

THERE IS NO STATUTORY AUTHORITY FOR THE ELECTION HELD.

There is authority for the submission of the question as to whether a consolidation is desired by the voters. There is no authority for the submission of a question as to whether the voters want a consolidation and whether they want it to be contingent on passage of a tax ordinance.

This objection does not run to the form of the ballot. No form of ballot is prescribed by Chapter 93, SLA 1953. Presumably any form that fairly presented the question authorized to be put could be used.

However, the question authorized was not put to the voters at all in this election. Thus, Chapter 93, SLA 1953, cannot be authority for this election.

III.

THE QUESTION AS TO THE FORM OF BALLOT USED IN THE ELECTION IS PROPERLY BEFORE THIS COURT.

Appellees contend that the question of the form of the ballot is not raised in appellants' statement of

points. This question is clearly raised in the statement by Points 2 and 3 (See P.R. 66). Appellants' statement of Point 2 (P.R. 66) reads as follows:

> "The Trial Court erred in making and entering its order of March 18, 1955, based upon ballots that did not conform to the Laws of the Territory of Alaska and the District Court order of election entered herein on January 21, 1955."

and appellants' statement of Point 3 (P.R. 66) reads as follows:

> "That the combined proposal and ballot used at the election of March 8, 1955, was contrary to law, and there was no law in the Territory of Alaska authorizing such combined proposal and ballot or such a ballot as was used at the election of March 8, 1955, in accordance with the Order of the District Court dated January 21, 1955, ordering the election on the proposed consolidated school district."

The ballot used in the election in the case at bar was so drawn that it clearly combined two separate and distinct propositions which is contrary to law. Therefore, the case of *Western National Insurance Co. v. LeClaire* cited by appellees (page 9 of Appellees' Brief) is definitely not in point.

Appellants submit their contention that the form of ballot used at the elections was defective and contrary to law was duly presented to the Court below since the ballot form is set out *verbatim* in both petitions of appellants (P.R. 37-43-44) and was strenuously argued in open Court. Moreover, appellants call the attention of this Honorable Court to the

fact that the ballot shows on its face that it doesn't conform to the District Court's "Order Calling for Election" (P.R. 14-17). For these reasons the argument of appellees and cases cited (Appellees' Brief, pages 8-9-10) are not valid or in point.

IV.

NO PROPER LEGAL FORM OF BALLOT WAS USED IN THE ELECTION.

It is true that the words in front of the little boxes in which the voter was to place his "X" told him that his vote would be counted "For Consolidation" or "Against Consolidation". But, any voter that read the ballot would know that by voting affirmatively or negatively he would also be voting for or against the proposition whether or not the consolidation would be contingent upon amendment of the Douglas City sales tax. This cannot be regarded as surplusage or merely informative matter. It is clearly put forth in the form of a proposition which the voter accepts or rejects.

The case of *State v. Osbourne,* cited at page 14 of appellees' brief, did not involve a ballot containing two propositions at all. One of the matters was already a part of the State Constitution, and, thus, was, in fact, surplusage. That cannot be said of either of the propositions presented by the ballot involved in the case at bar. Also, in the *Osbourne* case, neither proposition involved a contingency. It must be recognized that a ballot framed around the contingent oc-

currence of another event may be very tricky for the voter. Thus, the *Osbourne* case is not in point.

Williamston Graded Free-School District v. Webb, cited at page 17 of appellees' brief, is also distinguishable from the case at bar in its essential features. In that case a statute authorized a vote on the question of whether the voters wished to create a school district. The question put by the ballot was whether there should be a tax for the purpose of maintaining this school district. The Court held that this amounted to substantial compliance with the statute since the voter would know that if the tax were approved there would be a school district. The ballot contained only one proposition. That proposition did not contain any contingency. The voters, themselves, did have the power to levy the tax. The decision in that case turned on the Court's feeling that the proposition was made clear to the voter. These factors are not present in the case at bar. Thus, it is felt that the case is not in point, although the result is questionable as not being in line with other cases which have considered the points raised.

The case of *Critten v. New,* from which appellees quote at page 17 of their brief is far from being in point. The election there held was to decide the question of whether two school districts should consolidate. It was held at a meeting in each of the old school districts. The voters at these meetings knew that they only had authority to vote on the question of whether there should be a consolidation. The opinion of the Appellate Court brings out as a point of con-

trolling significance the fact that it was clearly recognized and understood by the voters at the meetings that they only had power to vote on the consolidation issue and that their action on the location of the schoolhouse site would be advisory only. Thus, the voters were really only voting on one proposition.

The cases of *Yowell v. Mace* (page 16 of Appellees' Brief), *Brennan v. Black* and *Sisco v. Caudle* (both at page 19 of Appellees' Brief), involved such minor deviations from the prescribed statutory form that the authorized question was still before the voters. None involved such a basic abandonment of the proposition authorized by statute as is involved in the case at bar.

The annotation at 122 A.L.R. 1142 (page 18 of Appellees' Brief) is not precisely in point, as it involves notices of a special election. Still, it is related to the issues in the case at bar and it does point out that where extraneous matter is misleading it will vitiate an election. This is one of the objections appellants are making, and it is evident that where two propositions are submitted to the voters as one, and one of the propositions is framed upon the contingent happening of another event, the result will be to mislead the voter.

V.

IF THE CITY OF DOUGLAS SCHOOL SALES TAX WAS VALID WHY WAS THE ELECTION BALLOT BASED ON A CONTINGENCY, AND HOW COULD A VALID AND LEGAL ORDER OF CONSOLIDATION BE ENTERED BEFORE THE SAID CONTINGENCY WAS FULFILLED?

If learned counsel is correct in his argument that an election was held in the City of Douglas on April 20, 1954, and the City of Douglas had a right to increase its Consumer's Sales Tax from 1% to 2% with the additional 1% tax to be used exclusively for school purposes, why was the election ballot so drawn so that the voters were obliged to vote on a contingency? No facts pertaining to any such election appear in the transcript of record on this appeal, and no proof was ever offered and the District Court was not requested to take judicial notice of any such election, and there is nothing in the record on this appeal to show that judicial notice was taken of any such fact.

Moreover, counsel argues at page 12 of his brief that any reading of the ballot clearly indicates that there was but one proposal set forth therein, namely, whether or not the voters were "For Consolidation", or "Against Consolidation". However, he then argues on page 26 of his brief that consolidation was contingent upon the City of Douglas amending its sales tax ordinance. He thereby admits that there were two propositions or contingencies on the one ballot. He also admits that the City of Douglas has refused to amend its sales tax ordinance and that a mandamus action is now pending in the District Court to force the City of Douglas to amend its sales tax ordi-

nance. This proves the entire argument of appellants that the ballots at the election were contingent upon the City of Douglas amending its sales tax ordinance, and that the City of Douglas has not amended its said ordinance, and that the District Court erred in making and entering its order of March 18, 1955, establishing Juneau-Douglas Independent School District, contrary to law and before the contingency set forth in the ballot was fulfilled.

CONCLUSION.

Since the trial Court entered its order of March 18, 1955, no change has been made in the operation of the schools in Juneau and Douglas in ignorance of the fact that this action has been pending. All concerned have been aware that there has been a serious question as to the validity of the election. A reversal of the trial Court's denial of appellants' petitions would mean nothing more than that the schools would once more conduct their affairs as they did before the election. In fact, the consolidation is not working out satisfactorily, as some students must be transported from Douglas to Juneau and others from Juneau to Douglas.

Appellants do have a right to question the validity of this election which Sections 56-4-1 and 56-4-2, ACLA 1949, cannot take away. In any event, they do have such right under Section 56-4-4, ACLA 1949.

In the election the voters were misled and confused in a number of ways. They had legal, if not actual, fraud practiced upon them.

It is respectfully submitted that the order appealed from should be reversed and the election should be declared void. Then, if it is desired, another election could be held and the issue fairly presented to the voters.

Dated, Juneau, Alaska,
February 22, 1956.

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